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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

NO. _____

FRED HAZARD, PETITIONER

v.

MARGARET HAZARD, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

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November 1, 1980

Questions Presented for Review

Where a veteran or federal employee has agreed to transfer to his former spouse, as part of the settlement of a domestic suit, certain benefits bestowed by federal statute, but such agreement is made without the knowledge of the parties that federal statutes expressly prohibit or prevent such a transfer,

(a) is the veteran or federal employee excused from the performance of such provisions of the contract, or, if not,

(b) is the veteran or federal employee properly held liable in damages for breach of contract in an amount equal to the present value of such benefits.

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TO THE
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The petitioner Fred Hazard respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the North Carolina Court of Appeals entered in this proceeding on April 15, 1980.

Questions Presented for Review

Where a veteran or federal employee has agreed to transfer to his former spouse, as part of the settlement of a domestic suit, certain benefits bestowed by federal statute, but such agreement is made without the knowledge of the parties that federal statutes expressly prohibit or prevent such a transfer,

(a) is the veteran or federal employee excused from the performance of such provisions of the contract, or, if not,

(b) is the veteran or federal employee properly held liable in damages for breach of contract in an amount equal to the present value of such benefits.

Statutes

5 U.S.C. 8341, Survivor Annuities

5 U.S.C. 8346, Exemption from Legal Process

5 U.S.C. 8705, Death Claims

38 U.S.C. 717, Insurance

38 U.S.C. 3021, Payment of Certain Accrued Benefits

38 U.S.C. 3101, Nonassignability and Exempt Status

(Verbatim text of pertinent portions are set forth in Appendix)

Opinions Rendered in Lower Courts

(a) General Court of Justice, Superior Court Division, Orange County, Judicial District 15-B, North Carolina; Civil Case No. 77 CVS 780; Judgment entered in favor of Plaintiff against Defendant on March 12, 1979 at 4:22 o'clock p.m. in the amount of $31,115.30, plus interest and costs.

(b) North Carolina Court of Appeals; No. 7915 SC 734; appeal by Defendant from judgment of Superior Court; affirmed April 15, 1980, certified May 5, 1980, 46 NCA 280, _____ SE2d _____.

(c) North Carolina Supreme Court denied Defendant's petition for discretionary review in conference on August 15, 1980, order issued August 25, 1980; _____ NC _____, _____ SE2d _____.

Statement of Jurisdictional Grounds

The juridiction of this Court is invoked under 28 USC 1257(3), upon the grounds that certain rights, privi-

leges, and immunities bestowed upon petitioner by Title 5 and Title 38 of the United States Code have been effectively abridged and denied by entry of a judgment for monetary damages.

Statutes Involved

(Body of pertinent portions of statutes are set forth verbatim in appendix.)

5 U.S.C. 8341, Survivor Annuities

5 U.S.C. 8346, Exemption from Legal Process

5 U.S.C. 8705, Death Claims

38 U.S.C. 717, Insurance Maturing on or after August 1, 1946

38 U.S.C. 3021, Payment of Certain Accrued Benefits upon Death of a Beneficiary

38 U.S.C. 3101, Nonassignability and exempt status of Benefits

Statement of Facts

Margaret Hazard brought suit in 1975 against Fred Hazard, a veteran and former federal employee, seeking alimony without divorce and other

relief. Fred Hazard denied liability, and the suit was eventually settled by means of a consent judgment signed by the parties and approved by the Court. Under North Carolina law, a consent judgment is treated as a contract between the parties and is subject to the general rules of contract law.

The consent judgment relieved Fred Hazard from any duty or obligation to pay alimony or support to his former spouse, and provided for the division of their property. The consent judgment specifically provided that Fred Hazard would transfer all his interest in his National Service Life Insurance policy and his Federal Employees Group Life Insurance program to his former spouse "so that she would be the owner thereof." Also, Fred Hazard was to name his former spouse as "irrevocable beneficiary"under his Survivors Benefit Plan, Department of the Army, and under his Civil Service Retirement Benefits Plan. All of the benefits involved in this proceeding were paya-

ble only at or after the death of the veteran or federal employee.

Subsequently, Mr. Hazard attempted to effect such transfers and such irrevocable designations of beneficiary in favor of Mrs. Hazard, but discovered that such actions were not permitted or possible under the federal statutes which created these benefits. The federal statutes reserved the right of designation of beneficiary to the veteran or federal employee, without provision for irrevocable designations, and provided that the policies were not assignable; or, the federal statutes specified the proper classes of beneficiaries, and by such specification excluded an ex-spouse as a proper recipient.

Mrs. Hazard then filed action against Mr. Hazard for damages in the nature of breach of contract. In his Answer, Fred Hazard stated as a defense that he had made every effort to perform all the terms and conditions of the consent judgment, and that if

any terms were not complied with it was because "they cannot not be complied with under the rules and regulations of the Veterans Administration, the Civil Service System, and other organizations involved...."

At trial of the action, both parties introduced into evidence testimony and exhibits which showed that federal statutes or regulations prohibited or prevented Fred Hazard from transferring ownership of the insurance policies to his ex-wife, or irrevocably designating her as beneficiary under his retirement or survivor benefit plans, and the trial judge so found as a fact. (App., pp. 30-32) The trial judge also found that neither party was aware of this legal disability at the time the consent judgment was made and entered into, (App., p. 30) but concluded as a matter of law that such a legal disability did not excuse the veteran or federal employee from his duty to perform under the contract. (App.,

pp. 44, 46, 48)

The trial judge then assessed damages against Mr. Hazard for breach of contract in the aggregate sum of $30,915.30, being the present value as of the date of the consent judgment for the benefits when Mr. Hazard had agreed, but was unable to transfer to his ex-spouse. Mr. Hazard entered notice of appeal, and the judgment was affirmed by the North Carolina Court of Appeals. Discretionary review was denied by the North Carolina Supreme Court.

Presentation of Federal Questions

The existence of federal law and regulations which prevented Fred Hazard from performing as required by the terms of the consent judgment was stated in the initial pleadings, as a further answer and defense in the Answer by Fred Hazard to Margaret Hazard's Complaint. The issue was clearly raised by the pleadings, and the facts in support thereof were

entered into evidence by both parties. The trial court judge found as a fact that by federal law and regulation a divorced spouse may not be the beneficiary or recipient of the benefits of these insurance policies or retirement plans. However, the trial court found that there was a breach of contract resulting from Fred Hazard's inability to perform, rather than an impossibility of performance which would avoid his obligation to perform. (App., pp. 44-45)

The North Carolina Court of Appeals ruled that the consent judgment was not an illegal and unenforceable contract, because the contract was not immoral, or criminal in itself, or contrary to public policy, but merely provided for the assignment or transfer of a right or benefit which federal law or regulation would not recognize. The Appellate Court then affirmed the judgment in all respects.

Reasons for Granting the Writ

This petition for certiorari to the Supreme Court of the United States is brought because the judgment rendered in the civil action in state court below accomplishes by indirect means a result which is prohibited by federal law if attempted by direct means, thus frustrating the purpose and intent of these certain federal statutes and the public policy which underlies them.

Four separate insurance policies or benefit plans are involved, creations of separate but basically similar sections of the United States Code. All have as their intent and purpose the provision of certain benefits to a veteran or civil servant, his widow, his children, or some beneficiary selected by him. The judgment below was rendered against a veteran and former federal employee because he had agreed to relinquish and transfer these benefits to his ex-wife as part of a consent judgment in settlement of

a domestic suit, but was protected from this result by the federal laws which created these benefits. Petitioner contends that the federal laws should also be deemed to protect the veteran or federal employee from a judgment in damages for the value of these non-transferable benefits.

Fred Hazard had agreed in the consent judgment to transfer to his ex-wife his interest in his National Service Life Insurance policy, so that she would be the owner thereof. National Service Life Insurance is created and administered under 38 U.S.C. 701, et. seq. However, 38 U.S.C. 3101(a) provides that "Payments of benefits due or to become due under any law administered by the Veterans Administration shall not be assignable . . .," and Fred Hazard was not able to make his ex-wife the owner of this policy. Further, 38 U.S.C. 717(a) provides that "The insured shall have the right to designate the beneficiary . . . . and shall, subject to regulations, at all times have the

right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries."

Federal law thus stated in clear and unequivocal terms that the veteran could not assign or transfer ownership, nor could he be deprived of his ability to designate or change beneficiaries. The trial court judge concluded that Fred Hazard was therefore in breach of contract and awarded damage in the amount of $564.20, being the cash surrender value of the policy as of the date of the consent judgment.

Fred Hazard had also agreed in the consent judgment to name his ex-wife as "irrevocable beneficiary" to all survivor's benefits or annuities under the Survivor's Benefit Plan, Department of the Army. These benefits are also created by and administered under Title 38, Veterans' Benefits, and 38 U.S.C. 3021(a)(2) specifically designates the proper and permitted recipients of such benefits

upon the death of the veteran. The benefits are payable first to his wife, then to his children, and finally to his parents. No provision is made or permitted which would allow an ex-wife of a veteran to receive such benefits, or for the veteran to irrevocably designate her as beneficiary. The trial court judge therefore awarded damages in the amount of $19,712.80, being the present value of those benefits.

Fred Hazard had also agreed in the consent judgment to name his ex-wife as "irrevocable beneficiary" to all survivor's benefits or annuities under the United States Civil Service Retirement System, a creation of and administered under Title 5 of the United States code. However, 5 U.S.C. 8346(a) provides that this benefit plan is not assignable. Because Fred Hazard was thus unable to irrevocably designate his ex-wife as beneficiary, the trial court judge awarded damages in the amount of $7,451.00, being the present value of such benefits.

Finally Fred Hazard had agreed in the consent judgment to transfer to his ex-wife his Federal Employers Group Life Insurance policy, so that she would be the Owner thereof. This program of insurance is also a creation of and administered under Title 5 of the United States code, and 5 U.S.C. 8705 provides that the proceeds under such policies shall be payable first to the beneficiaries designated in writing by the veteran. No provision is made for the transfer of ownership of such policies, and the federal employee would thus always have the right to change beneficiaries. The trial judge therefore awarded damages in the amount of $1,946.00.

In addition to these specific and direct sections of statutory law which prohibited or prevented the performance of these portions of the consent judgment, 38 U.S.C. 3101(a) also provides that the payments of benefits under the National Service Life Insurance policy and the

Survivor's Benefit Plan, Department of the Army, are "exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." Likewise, 5 U.S.C. 8346 provides that the payments under Civil Service Retirement System are not subject to execution, levy, attachment, garnishment, or other legal process.

Although different sections of the United States Code are involved, and the language and applications are not identical, we do have certain basic threads of similarity that come together to raise a common issue.

First, a veteran or federal employee is made entitled to certain benefits by reason of his prior service to his country, and these benefits are created and conferred by Congress acting by and through federal statutes.

Second, Congress acts generously to bestow these privileges and bene-

fits as a reward for such service to the country, but Congress goes on to make these benefits non-transferable. The language of the statutes involved makes clear the intent of Congress that these benefits are to follow the veteran or federal employee. Certain benefits are restricted solely to certain classes of recipients, and former spouses are excluded from this designation. Other benefits are for the person or persons selected by the veteran or federal employee, and his ability to make or to change his selection may not be restricted.

Third, the statutes mandate that these benefits are not to be stripped from the veteran or federal employee by creditors or other parties, and the courts are specifically instructed not to use their powers to frustrate the intent of Congress.

Faced with these specific and clear provisions of statutory law, the trial court was unable to award specific performance of the contract, just as Fred Hazard was unable to

voluntarily comply despite his good faith efforts. Nor could the trial court make the ex-wife the recipient of benefits denied her by law, either by court order naming her irrevocably as beneficiary or by order attaching the proceeds for her benefit.

Instead, the trial court took the indirect route of awarding a judgment for damage in an amount equivalent to the present values of these benefits. By taking this route, the trial court judge not only frustrated the clear intent of federal law, but he also did more damage to the veteran. All of these benefits would have been payable only after the death of the veteran, and the question would be limited to the selection of the proper recipient.

In the present case, however, the veteran and federal employee is personally liable to his ex-wife in an amount equal to the present value of benefits he never personally would have received. His present estate and means for his livelihood is to be depleted by the sum of $30,915.30, no

part of which he has any hope or chance of ever receiving during his lifetime.

The public policy involved in this case is made clear by the express and unequivocal language of the federal statutes. Congress has acted to bestow these benefits to those men and women who have served their country in the armed services and in the civil service.

These benefits are part of a comprehensive plan to provide aid and comfort to the veteran or federal employee when he or she is old, sick, or disabled, and to their surviving spouses, children, or other dependents upon their death. The public interest is well served when the veteran or federal employee has the security provided by the knowledge that he and his immediate family will not be rendered destitute as a result of his sickness or death.

Clearly, these interests are not so served when a former spouse of a veteran or federal employee manages to

strip these benefits away during the course of a divorce proceeding. Once ownership and control of the disposition of these assets have been wrested from him by divorce decree or agreement, no security is afforded for a subsequent spouse, child, or dependent parent.

The Supreme Court of the United States and other federal and state courts of review have recognized this public policy and legislative intent in cases involving National Service Life Insurance policies. In the landmark case of Wissner v. Wissner, 338 U.S. 655 (1950), this Court looked to the specific statutory language and to the Supremacy Clause of the United States Constitution in holding that the judgment of the state court was invalid when it attempted to nullify the veteran's ability to designate the beneficiary, or in attempting to divert future payments of proceeds.

The principal laid down in Wissner has been followed by numerous courts in holding that such benefits may not

be reached or their disposition controlled in contradiction to statutory plan, either by separation agreement or by court decree in domestic proceedings. Hoffman v. United States, 391 F.2d 195 (CA 9, 1968); Pack v. United States, 176 F.2d 770 (CA 9, 1949); Eldin v. United States, 157 F Supp. 34 (S.D. Ill., 1957); Kaske v. Rothert, 133 F. Supp. 427 (S.D. Calif., 1955); Heifner v. Soderstrom, 134 F. Supp. 174 (N.D. Iowa, 1955); Kimball v. United States, 304 F.2d 864 (CA 6, 1962).

In each of the cases cited above, the ability of the veteran to designate or change the beneficiary of the policy was deemed not to be impaired by his agreement to irrevocably designate his ex-spouse as beneficiary, or by a court decree to the same effect based on an incorporated agreement or on community property law.

By awarding damages in the present case, rather than attempting an order which would be ineffectual, the trial

court has frustrated legislative policy to the same or even greater degree. The opinion of the North Carolina Court of Appeals herein conflicts in principle with the decisions of this Court and of the Courts of Appeal of other districts as cited above. Further, the awarding of damages for breach of a contract where the performance thereof is prohibited by statute is in conflict with well established law and the decisions of this Court.

While there are circumstances where damages may be awarded from breach due to non-performance caused by law or regulation, those circumstances are limited generally to cases involving contracts wherein one of the parties clearly assumed such a risk.

However, this Court has held in numerous cases that where illegality in the contract or in the performance thereof is discovered, the court should leave the parties as it finds them and make no award of damages or

restitution to either party. Weil v. Neary, 278 U.S. 160 (1929); Eivert v. Bluejacket, 259 U.S. 129 (1922); Waskey v. Hammer, 223 U.S. 85 (1912); McMullen v. Hoffman, 174 U.S. 639 (1899)

This Court has held to this general rule of law even where the parties have not pled illegality as a defense, stating that where such illegality appears from the case as made by either party, it becomes the duty of the court sua sponte to refuse to entertain the action. McMullen v. Hoffman, supra; Oscanyan v. Arms Company, 103 U.S. 261 (1880).

However, in the trial court below the trial judge found as a fact that federal law or regulation prevented Fred Hazard from performing certain provisions of the consent judgment, but that he was not thus excused from performance and was therefore liable in damages.

The statutory benefits at issue here are enjoyed by hundreds of thousands of veterans and retired

federal employees across the nation. No doubt a sizeable portion of these people will face domestic turmoil, separation and divorce. This Court has already spoken in Wissner, supra, in establishing the surpremacy of these federal statutes over conflicting separation agreements or court decrees rendered in the course of dividing the marital or community properties.

This Court should grant this petition for certiorari to establish that the principles set forth in Wissner and related cases cannot be avoided by suing under general contract law for monetary damages.

Respectfully submitted,
John A. Northen
Counsel for Petitioner

NORTH CAROLINA	IN THE GENERAL COURT
ORANGE COUNTY	OF JUSTICE SUPERIOR COURT DIVISION
	File No. 77 CVS 780
MARGARET C. HAZARD, Plaintiff	
vs.	JUDGMENT
FRED HAZARD, Defendant	

This cause came on to be heard before the undersigned Judge without a jury at January 22, 1979 Civil Session. The Court heard evidence for Plaintiff and Defendant, and considered the documentary evidence, the admissions and stipulations of the parties, and the arguments of counsel. From the evidence, admissions, and stipulations, the Court makes these findings and conclusions:

FINDINGS OF FACT

1. Plaintiff and Defendant were married in February, 1943, and they thereafter lived together as husband and wife until August, 1975, at which time they separated. The children of the marriage became of age before December 1, 1975.

2. On October 9, 1975, the Plaintiff, Margaret C. Hazard, instituted a suit against the Defendant, Fred Hazard, in the District Court Division in Orange County (75 CVD 599), wherein Margaret C. Hazard sought to obtain alimony and counsel fees from Fred Hazard pursuant to provisions of G.S. 50-16. An answer was filed by Fred Hazard contesting the Plaintiff's right to alimony, it being alleged in the answer that the Plaintiff was not a dependent spouse and that she had abandoned the Defendant. During the trial of this action the parties agreed upon a settlement of the matters in dispute, and pursuant to said settlement, a Final Judgment was

entered in that action by consent of the parties on December 1, 1975, a copy of that Final Judgment being Exhibit "A" attached to the Complaint herein. Plaintiff was represented in that action by K. Byron McCoy, of the firm of NEWSOM, GRAHAM, STRAYHORN, HEDRICK, MURRAY & BRYSON, of Durham, and the Defendant was represented by F. Gordon Battle of Chapel Hill, and these attorneys continued to represent the respective parties during negotiations following the entry of that Judgment.

3. The parties evidenced their consent to this Judgment by signing it, and the Plaintiff was privately examined by the presiding Judge in accordance with statute. As between the parties this Final Judgment was a contract between the parties.

4. Except with respect to paragraphs 1b and 1c of the Judgment, there is not evidence that either party has failed to comply with the terms of this Judgment.

5. By paragraph 1b the Defendant,

Fred Hazard, agreed to transfer to Margaret C. Hazard "his interest" in certain described life insurance policies, "so that the Plaintiff will be the owner of said policies. Hereafter Defendant shall not be responsible for the payment of any premiums on said policies."

6. By paragraph 1c of the Judgment, Fred Hazard agreed to name Margaret C. Hazard "as irrevocable beneficiary to all Survivor's Benefits or Annuities under the following plans: (1) The United States Civil Service Retirement System, and (2) Survivor's Benefit Plan, Department of the Army."

7. It is apparent that the parties had substantially equal knowledge of the existence and the terms of the several insurance policies and certificate and of the two retirement plans, but neither party was aware of the full details of the policies and plans, and neither party was aware at the time the Judgment was entered that the National Service Life Insurance

policy, the Federal Employer's Group Life Insurance Program, the Survivor's Benefits of the United States Civil Service Retirement System, and the Survivor's Benefit Plan, Department of the Army, were not assignable or transferrable so that a divorced spouse could be made the irrevocable beneficiary of them.

8. Prior to December 1, 1975, Fred Hazard made no effort to determine wnether or not he could carry out the provisions of paragraphs 1b and 1c. After December 1, 1975, both parties through their attorneys made efforts to carry out the provisions of paragraphs 1b and 1c, and Fred Hazard made a good faith effort to comply with his agreement and the direction of the Judgment as to the National Service Life Insurance policy, the Federal Employer's Group Life Insurance Program, the United States Civil Service Retirement System, and the Survivor's Benefit Plan, Department of the Army prior to his obtaining an ab-

solute divorce.

9. Fred Hazard has not taken any action to terminate the authorities and elections previously made which made Margaret C. Hazard beneficiary of these policies and plans.

10. By Federal law and regulation a divorced spouse may not be the beneficiary or recipient of the benefits of National Service Life Insurance, of Federal Employer's Life Insurance Program benefits, or of Survivor's Benefits or Annuities under the United States Civil Service Retirement System, and the Survivor's Benefit Plan, Department of the Army.

11. On or about 18 August 1976 Fred Hazard instituted an action for divorce against Margaret C. Hazard on the grounds of one year's separation in the District Court of Orange County (76 CVD 531). Margaret C. Hazard filed answer and counterclaim attempting to raise the failure of Fred Hazard to comply with the Judgment of December 1, 1975, as a bar to his divorce and as a counterclaim.

A Judgment of absolute divorce was granted on March 17, 1977 by the District Court, and thereafter on appeal this Judgment was affirmed by the Court of Appeals on March 21, 1978, at which time the divorce became absolute.

12. The parties did not assign any specific values to any of the policies or retirement benefits in their negotiations prior to the entry of Judgment on December 1, 1975, and it is apparent that they did not consider the amount of any values of the insurance policies or the present value of the right to survivor's benefits or annuities in their settlement.

FINDINGS PERTAINING TO SOUTHERN LIFE INSURANCE COMPANY POLICIES

13. Southern Life Insurance Company Policy number B126400 is an ordinary life policy insuring the life of Ann Arnot Hazard, daughter of Fred and Margaret C. Hazard, in the principal amount of TEN THOUSAND ($10,000.00)

DOLLARS.

14. Southern Life Insurance Company Policy number B126399 is an ordinary life policy insuring the life of Alan Fred Hazard, son of Fred and Margaret C. Hazard, in the face amount of TEN THOUSAND ($10,000.00) DOLLARS.

15. These policies were taken by Fred Hazard when his children were minors, and he was the named beneficiary up to and including December 1, 1975, but upon the children becoming adults, they became the respective owners of their policies, and Fred Hazard has had no rights of ownership therein, and the respective owners have the right to designate or change the beneficiary.

16. A loan for the full amount available of SEVEN HUNDRED SEVENTY-EIGHT AND 10/100ths DOLLARS ($778.10) was obtained on each of these policies on August 16, 1971, the certificates of loan being signed by the respective insureds and by Fred Hazard as beneficiary. There has been no evidence as to who received the pro-

ceeds of these loans.

17. As of December 1, 1975, each of the policies had a cash surrender value of ONE THOUSAND TWO HUNDRED FIFTY-THREE and 40/100ths ($1,253.40) DOLLARS, subject to a loan balance of NINE HUNDRED EIGHTY-TWO and 31/100ths ($982.31) DOLLARS.

18. As of July, 1978, each of these policies lapsed for nonpayment of premiums and has been converted by the terms of the policy into extended insurance as of that date. The net surrender value at present time of each policy is THREE HUNDRED TWELVE and 79/100ths ($312.79) DOLLARS.

19. Ann Arnot Hazard has caused Margaret C. Hazard to be made beneficiary of her policy, but Alan Fred Hazard has not, insofar as the evidence discloses.

FINDINGS PERTAINING TO UNITED STATES OF AMERICA NATIONAL SERVICE LIFE INSURANCE POLICY

20. Fred Hazard is the named insured and owner of National Service Life Insurance Policy number V16634578

(Plaintiff's Exhibit "13"), in the face amount of TEN THOUSAND ($10,000.00) DOLLARS, issued effective August 10, 1971, and Margaret C. Hazard was the named beneficiary therein. The monthly premium on this policy is FORTY-THREE and 40/100ths ($43.40) DOLLARS.

21. In the negotiations and efforts to transfer ownership in this policy after December 1, 1975, it was determined that by Federal law and regulation the owner of such a policy cannot transfer ownership therein or make anyone irrevocable beneficiary and a divorced spouse may not be the beneficiary of the policy.

22. By the terms of the Judgment Margaret C. Hazard was to have assumed the obligation of payment of the premiums of this policy and during the period of negotiations and efforts to change the beneficiary she paid premiums in the amount of FIVE HUNDRED SIXTY-FOUR and 20/100ths ($564.20) DOLLARS. Fred Hazard has received dividends on this policy since

December 1, 1975.

23. This policy according to the table contained in the policy, had a cash surrender value on August 10, 1975, after four years, of ONE THOUSAND TWO HUNDRED FORTY-ONE and 30/100ths ($1,241.30) DOLLARS. Its cash surrender value as of this date is approximately TWO THOUSAND THREE HUNDRED FIFTEEN and NO/100ths ($2,315.00) DOLLARS, based on seven and one-half years.

24. Under Federal law and regulation, Fred Hazard would be entitled to change the beneficiary on this policy and to receive the cash surrender value of the policy.

FINDINGS PERTAINING TO
AVEMCO INSURANCE COMPANY
POLICY NUMBER 203793

25. The AVEMCO Insurance Company Policy number 203793 (Plaintiff's Exhibit "12"), referred to in paragraph 1b(4) of the Judgment, is a certificate of accident insurance issued in connection with membership in the Aircraft Owners and Pilots Association,

and it provides insurance for loss of life, limbs, or sight by accidental means in aviation accidents only. A new policy is issued each year upon renewal of membership in this association.

26. Policy number 203793 expired on February 28, 1976. No evidence of any monetary value of this policy has been shown, and the Court is of the opinion that any right of recovery on it is too speculative to have been a consideration in entering into the contract contained in the Judgment, and too speculative to be an element of damage or breach of the contract.

FINDINGS PERTAINING TO FEDERAL EMPLOYER'S GROUP LIFE INSURANCE PROGRAM

27. Fred Hazard was employed by an agency of the Federal Government under Civil Service from 1965 until about the end of 1977. As a Federal employee he was entitled to insurance provided by the U.S. Civil Service Commission in accordance with the Federal Employees Group Life Insurance

law. Rights were evidenced by the certificate of insurance which is Plaintiff's Exhibit "11". Insurance coverage was based on annual base pay, and at a base pay of THIRTEEN THOUSAND and NO/100ths ($13,000.00) DOLLARS Fred Hazard would have had life insurance coverage of SIXTEEN THOUSAND and NO/100ths ($16,000.00) DOLLARS until his 65th birthday. Coverage would thereafter be reduced at the rate of two percent a month until it reached FOUR THOUSAND and NO/100ths ($4,000.00) DOLLARS. A premium of TWELVE and NO/100ths ($12.00) DOLLARS monthly was deducted from his pay until retirement, and no premium was due thereafter.

28. The rights to this insurance are not assignable and an irrevocable beneficiary cannot be designated. A divorced spouse is not entitled to the benefits of this policy. In the absence of the designation of a beneficiary the children of the insured would be the beneficiaries of the policy if the insured left no

surviving widow.

29. Based on Fred Hazard's age of 61 in 1975 and a life expectancy of 15.43 years and on Margaret C. Hazard's age of 60 and her probability of surviving him, this policy had a present value as of December 1, 1975 of ONE THOUSAND NINE HUNDRED FORTY-SIX and NO/100ths ($1,946.00) DOLLARS, a value as of October 27, 1977, the date of beginning this action, of TWO THOUSAND ONE HUNDRED SEVENTY-SEVEN and NO/100ths ($2,177.00) DOLLARS, and as of present date of TWO THOUSAND ONE HUNDRED NINETY and NO/100ths ($2,190.00) DOLLARS.

FINDINGS PERTAINING TO UNITED STATES CIVIL SERVICE RETIREMENT

30. As a result of his Federal employment, Fred Hazard is entitled to the benefits provided by the Civil Service Retirement Plan. His entitlement is based on his earnings and years of service, and the survivor's benefits for a widow is 55 percent of what the employee was receiving at his

death.

31. Based on a salary of TWELVE THOUSAND and NO/100ths ($12,000.00) DOLLARS at retirement, the present benefit to Fred Hazard would be TWO HUNDRED NINETY and NO/100ths ($290.00) DOLLARS per month, and 55 percent of that would be ONE HUNDRED FIFTY-NINE and 50/100ths ($159.50) DOLLARS. Based on the respective ages of Fred Hazard and Margaret C. Hazard, and the probability of her surviving him by 5.3 years, the present value of an annuity of ONE HUNDRED FIFTY-NINE and 50/100ths ($159.50) DOLLARS, as of October 27, 1977 EIGHT THOUSAND FOUR HUNDRED TWENTY-EIGHT and NO/100ths ($8,428.00) DOLLARS, and as of this date SEVEN THOUSAND SEVEN HUNDRED TWENTY-TWO AND NO/100ths ($7,722.00) DOLLARS.

32. Fred Hazard was not permitted by Federal law or regulation to make Margaret C. Hazard irrevocable beneficiary of this plan, and a divorced spouse may not be a beneficiary of this plan.

FINDINGS PERTAINING TO SURVIVOR'S BENEFIT PLAN, DEPARTMENT OF THE ARMY

33. Fred Hazard served in the U.S. Army for 20 years and for retirement purposes was considered to have served for 22 years. He was entitled by his length of service to retirement benefits of 55 percent of his base pay at retirement plus certain cost of living increases provided by Federal regulations, and his base pay at retirement was SIX HUNDRED SIXTY AND NO/100ths ($660.00) DOLLARS per month. By virtue of cost of living increases his retirement income from this plan as of December 1, 1975 was approximately SEVEN HUNDRED FORTY-FIVE and NO/100ths ($745.00) DOLLARS per month.

34. Fred Hazard had elected a plan whereby his surviving spouse was entitled to 55 percent of the amount of retirement benefits he was receiving at death, and he received a reduced retirement benefit as a result of this election. As of December 1,

1975, the retirement benefit to which Margaret C. Hazard would have been entitled was FOUR HUNDRED NINE and NO/100ths ($409.00) DOLLARS per month.

35. Based on the respective ages of the parties, and the probable life expectancy of Margaret C. Hazard of 5.3 years after the death of Fred Hazard, the Court determines the present value of an annuity of FOUR HUNDRED NINE and NO/100ths ($409.00) DOLLARS per month for 5.3 years to be NINETEEN THOUSAND SEVEN HUNDRED TWELVE and 80/100ths ($19,712.80) DOLLARS. While the Army Retirement Plan provides for cost of living increases, the Court determines that these would be too speculative for determination at this time and that such cost of living increases were not within the contemplation of the parties at the time of entering into the Judgment.

CONCLUSIONS OF LAW

1. As between the parties the Judgment in the case of "Margaret C. Hazard vs. Fred Hazard", 75 CVD 599, which is Exhibit "A" attached to the

Complaint in this action, was a valid and binding contract. That the consideration furnished by Margaret C. Hazard was the relinquishing of any and all marital rights, including a disputed right to alimony from Fred Hazard, and by reason of the absolute divorce obtained by Fred Hazard, these rights cannot now be restored.

2. That there has been partial performance of the contract by the conveyance of property in accordance with paragraph 1a of the Judgment, the division of personal property as provided by paragraph 2 of the Judgment, and the payment of debts as provided by paragraph 3 of the Judgment. That even if it were determined that there was an impossibility of performance as to all or part of the provisions of paragraph 1b of the Judgment, the Plaintiff would be entitled to be restored to her original position, and since she may not now maintain an action for alimony, this position must be measured by the value of the interests which the Defendant agreed to

transfer to the Plaintiff, as they existed at the time of the Judgment.

3. The Court is of the opinion that as to the National Service Life Insurance policy, the rights in he Federal Employer's Group Life Insurance Program, and the agreement to make Margaret C. Hazard irrevocable beneficiary to all survivor's benefits under the United States Civil Service Retirement System Plan and the Survivor's Benefit Plan, Department of the Army, that there is a breach of the contract resulting from the Defendant's inability to perform these obligations, rather than an impossibility of performance which would avoid his obligation to perform.

4. As to the Southern Life Insurance Company policy, the only interest of the Defendant was the interest as named beneficiary, which was subject to change by the respective owners of those policies, and the Defendant had no interest as owner in those policies which he could transfer to the Plain-

tiff.

5. It was not within the contemplation of the parties that any rights other than those which he had in the Southern Life Insurance Company policies would be transferred.

6. The Defendant may satisfy his obligation as to the Southern Life Insurance Company policies by executing and delivering to Plaintiff an assignment of all rights he has or may have as a present or contingent beneficiary in those policies, with notice to the Southern Life Insurance Company of such irrevocable transfer of such interest. The evidence shows that Margaret C. Hazard is now the named beneficiary of the policy insuring the life of Ann Arnot Hazard and has paid premiums thereon.

7. As to the AVEMCO insurance policy, which was the policy expiring February 28, 1976, it was not within the contemplation of the parties that the Defendant was required to maintain membership in the Aircraft Owners ano Pilots Association so as to be en-

titled to future similar policies, and his failure to assign or otherwise transfer this policy resulted in no damage to Plaintiff.

8. As to the National Service Life Insurance policy, the Defendant is not permitted by reason of Federal law and regulation to transfer or assign any interest therein to the Plaintiff or to make her irrevocable beneficiary, and the Defendant remains the owner of that policy. No evidence as to its value has been shown except the cash surrender values provided in the policy. The Plaintiff is entitled to recover of the Defendant the cash surrender value of that policy as of December 1, 1975, and the premiums paid by her on that policy after December 1, 1975 in the amount of FIVE HUNDRED SIXTY-FOUR and 20/100ths ($564.20) DOLLARS.

9. As to the Federal Employer's Group Life Insurance Company program, Fred Hazard is not permitted by Federal

law and regulation to transfer ownership therein or to make Margaret C. Hazard irrevocable beneficiary thereof. Margaret C. Hazard is entitled to recover the value of those benefits as of December 1, 1975, in the amount of ONE THOUSAND NINE HUNDRED FORTY-SIX and NO/100ths ($1,946.00) DOLLARS.

10. As to the United States Civil Service Retirement System Benefits, Fred Hazard is unable by reason of Federal law and regulation to make Margaret C. Hazard irrevocable beneficiary as to those benefits and she is not permitted by law to receive such benefits. She is entitled to recover the present value of those benefits as of December 1, 1975, in the amount of SEVEN THOUSAND FOUR HUNDRED FIFTY-ONE and NO/100ths ($7,451.00) DOLLARS.

11. As to the Survivor's Benefit Plan, Department of the Army, Fred Hazard is unable by reason of Federal law and regulation to make Margaret C. Hazard irrevocable beneficiary as to those benefits and she is not per-

mitted by law to receive such benefits. She is entitled to recover the present value of those benefits as of December 1, 1975, in the amount of NINETEEN THOUSAND SEVEN HUNDRED TWELVE and 80/100ths ($19,712.80) DOLLARS.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That Fred Hazard execute and deliver to Margaret C. Hazard an irrevocable assignment of any interest as beneficiary in Southern Life Insurance Company policies described in the Complaint, with notice to Southern Life Insurance Company of such assignment.

2. That Plaintiff have and recover of the Defendant as the value of the National Service Life Insurance Company policy the sum of ONE THOUSAND TWO HUNDRED FORTY-ONE and 30/100ths ($1,241.30) DOLLARS, plus premiums paid by the Plaintiff in the amount of FIVE HUNDRED SIXTY-FOUR and 20/100ths ($564.20) DOLLARS, with interest thereon from December 1, 1975.

3. That the Plaintiff have and recover of the Defendant as the value of the Federal Employer's Group Life Insurance Company Program Benefits the sum of ONE THOUSAND NINE HUNDRED FORTY-SIX an NO/100ths ($1,946.00) DOLLARS with interest thereon from December 1, 1975.

4. That Plaintiff have and recover of the Defendant as the value of the United States Civil Service Retirement System Benefits the sum of SEVEN THOUSAND FOUR HUNDRED FIFTY-ONE and NO/100ths ($7,451.00) DOLLARS, together with interest thereon from December 1, 1975.

5. That the Plaintiff have and recover of the Defendant as the value of the Survivor's Benefit Plan, Department of the Army, the sum of NINETEEN THOUSAND SEVEN HUNDRED TWELVE and 80/100ths ($19,712.80) DOLLARS, together with interest thereon from December 1, 1975.

6. That the Defendant pay the costs of this action, including an expert witness's fee for Dr. Finley

Lee in the amount of $200.00.

This the 12th day of March, 1979.

HENRY MCKINNON
Judge Presiding

No. 7915SC734

NORTH CAROLINA COURT OF APPEALS

Filed: 15 April 1980

MARGARET C. HAZARD

v. Orange County
No. 77 CVS 780

FRED HAZARD

Appeal by defendant from McKinnon, Judge. Judgment entered 12 March 1979 in Superior Court, Orange County. Heard in the Court of Appeals 27 February 1980.

Plaintiff seeks to recover damages for breach of Consent Judgment wherein defendant promised to convey ownership of certain insurance policies to plaintiff and to make plaintiff an "irrevocable beneficiary" of certain United States Army and Civil Service Survivor Benefit Plans.

In his answer defendant pled a good faith effort to perform under the terms of the Consent Judgment but that performance was impossible because of the rules and regulations promulgated by the Veterans Administration, the

Civil Service System and other pertinent organizations.

In 1975 plaintiff filed action in the District Court of Orange County against her husband of 32 years, the defendant herein for temporary and permanent alimony. A settlement was reached and a Consent Judgment was entered on 1 December 1975 which provided in pertinent part as follows:

> "b. Transfer to Plaintiff his interest in the following Life insurance policies, so that the Plaintiff will be the owner of said policies. Hereafter Defendant shall not be responsible for the payment of any premiums on said policies.
>
> (1) Southern Life Insurance Company, Policy No. B126400, insuring the life of Ann Arnot Hazard in the principal amount of $10,000.00.
>
> (2) Southern Life Insurance Company, Policy No. B126399, insuring the life of Alan Fred Hazard in the face

amount of $10,000.00.

(3) The United States of America National Service Life Insurance, Policy No. V16634578, insuring the life of Fred Hazard in the face amount of $10,000.00.

(4) AVEMCO Insurance Company, Policy No. 203793, in suring the life of Fred Hazard in the face amount of $20,000.00.

(5) Federal Employer's Group Life Insurance Program, Certificate - Regular Insurance, in suring the life of Fred Hazard, employee, in such amounts as are applicable under the Group policy, which provides the insurance referred to in the individual certificate.

c. That Fred Hazard shall name Margaret C. Hazard as irrevocable beneficiary to all Survivor's Benefits or Annuities under the following plans:

(1) The United States Civil Service Retirement System.

(2) Survivor's Benefit Plan, Department of the Army."

In August 1976 defendant filed an action for absolute divorce on grounds of one-year separation. Plaintiff sought unsuccessfully to contest the divorce due to defendant's failure to perform under the Consent Judgment. See Hazard v. Hazard, 35 N.C. App. 668, 242 S.E. 2d 196 (1978).

At trial without jury the evidence tended to show, and the trial court found, that when the Consent Judgment was entered on 1 December 1975 neither party was aware that the National Service Life Insurance policy, the Federal Employer's Group Life Insurance Program, the Survivor's Benefits of the United States Civil Service Retirement System, and the Survivor Benefit Plan, Department of the Army, were not assignable or transferable under federal law and regulations, and defendant-husband had made no effort to determine whether he could carry out the terms of Paragraphs 1b and 1c of the Judgment.

The trial court concluded that there was a breach of the contract

resulting from defendant's inability to perform, and that plaintiff is entitled to be restored to her original position, and this position must be measured by the value of the interests which the defendant agreed to transfer to the plaintiff, as they existed at the time of the Judgment. The trial court determined the value of these interests and entered judgment for plaintiff for the sums so determined.

Manning, Jackson, Osborn & Frankstone by David R. Frankstone and Frank B. Jackson for plaintiff appellee.

John A. Northen for defendant appellant.

CLARK, Judge.

The defendant makes two arguments: First, that the contract was illegal and therefore unenforceable, and, second, that defendant is excused by impossibility of performance. We find neither argument convincing.

It does not appear that defendant's

illegal contract argument is properly before this Court on appeal because illegality was not pled as an affirmative defense, G.S. 1A-1, Rule 8(c), and there was no exception to the exclusion of the trial court that "[a]s between the parties [the judgment] was a contract. . . ." Rule 10(a), N.C. Rules of Appellate Procedure. Nevertheless, it is clear that the consent judgment was not an illegal and unenforceable contract. The contract was not immoral, or criminal in itself, or contrary to public policy, but merely provided for the assignment or transfer of a right or benefit which federal law or regulation would not recognize. See, Marriott Financial Services, Inc. v. Capitol Funds, 288 N.C. 122, 217 S.E. 2d 551, 77 A.L.R. 3d 1036 (1975); 17 C.J.S. Contracts Section 190 (1963).

Next, the defendant relies on the doctrine of impossibility of performance. We find his reliance misplaced. The defendant made a promise to transfer and assign to the

plaintiff certain rights and benefits; he made no effort to determine if federal law or regulation would not permit performance. Plaintiff has executed her promise and given up a valuable right to alimony, a right which has been extirpated by divorce. Now defendant argues that the impossibility existed at the time the contract was made and made the contract unenforceable. There is authority to support this general principle of contract law. See 17A C.J.S. Contracts Section 462 (1963); 17 Am. Jur. 2d Contracts Section 404 (1964); Corbin on Contracts Section 1326 (1962). We do not, however, find that this general principle applies to the case sub judice.

"A promisor should not be excused from responding in damages for breach of contract on the ground of impossibility of performance due to a mistake in a situation, where due to his own negligence, he had failed to discover at the time of entering into the contract the nonexistence of the fact or

thing which made performance by him impossible." In re Zellmer, 1 Wis. 2d 46, 82 N.W. 2d 891, 894 (1957).

In Lane v. Coe, 262 N.C. 8, 136 S.E. 2d 269 (1964), defendant promised performance knowing that his ability to perform would depend on the cooperation of a third party. Subsequently, the third party refused to cooperate and defendants's performance became impossible. It was held that defendant could not avail himself of the defense of impossibility of performance.

Similarly, in Helms v. Investment Co., 19 N.C. App. 5, 198 S.E. 2d 79 (1973), the plaintiffs purchased a tract of land upon the warranty of defendant that water and sewer facilities would be made available within six months. The governing authorities of the City of Charlotte and Mecklenburg County prohibited the installation of the facilities becaue of pollution problems. The trial court granted summary judgment for plaintiffs on the issue of liability. This Court held that the defendant under the

terms of its guaranty to the plaintiffs assumed the risk that the governing authorities might interpose objections, and defendant was liable to the plaintiffs for any damages sustained by their failure to perform the contract, citing 17 Am. Jr. 2d Contracts Sections 418, 419, 423 and 17A C.J.S. Contracts Section 463(1). See also, 17 Am. Jur. 2d Contracts Sections 406, 407 (1963)

The promise made by plaintiff has been executed and her marital rights cannot be restored. The value of her rights has been established by the parties inter se as equal to the market value of the benefits defendant agreed to confer on her. Since defendant could not confer these benefits he must respond in damages, damages based on the fair market value of the benefits. The trial court so determined. The amount awarded was not contested or argued on appeal.

The judgment is

Affirmed.

Judges MARTIN (Robert M.) and ERWIN concur.

5 U.S.C. 8341. Survivor Annuities.

(a) For the purpose of this section -

"widow" means the surviving wife of an employee or Member who -

(A) was married to him for at least one year immediately before his death; or

(B) is the mother of issue by that marriage.

(b)(1) Except as provided in paragraph (2) of this subsection, if an employee or Member dies after having retired under this subchapter and is survived by a spouse to whom he was married at the time of retirement, or by a widow or widower whom he married after retirement, the spouse, widow, or widower is entitled to an annuity equal to 55 percent, or 50 percent if retired before October 11, 1962, of an annuity computed under section 8339(a)-(i) and (o) of this title as may apply with respect to the annuitant, or of such portion thereof as may have been designated for this purpose under section 8339(j) of this

title, unless the employee or Member has notified the Office in writing at the time of retirement that he does not desire any spouse surviving him to receive his annuity, or in case of remarriage, he did not file an election under the third sentence of section 8339(j) of this title.

5 U.S.C. 8346. Exemption from legal process; recovery of payments.

(a) The money mentioned by this subchapter is not assignable, either in law or equity, except under the provisions of subsections (h) and (j) of section 8345 of this title, or subject to execution, levy, attachment, garnishment, or other legal process, except as otherwise may be provioed by Federal laws.

5 U.S.C. 8705. Death claims; order of precedence; escheat

(a) The amount of group life insurance and group accidental death insurance in force on an employee at the date of his death shall be paid, on the establishment of a valid claim, to the person or persons surviving at

the date of his death, in the following order of precedence:

First, to the beneficiary or beneficiaries designated by the employee in a signed and witnessed writing received before death in the employing office or, if insured because of receipt of annuity or of benefits under subchapter I of Chapter 81 of this title as provided by section 8706(b) of this title, in the Office of Personnel Management.

38 U.S.C. 3101. Nonassignability and exempt status of benefits.

(a) Payments of benefits due or to become due under any law administered by the Veterans' Administration shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.

38. U.S.C. 717. Insurance maturing on or after August 1, 1946.

(a) The insured shall have the right to designate the beneficiary or beneficiaries of insurance maturing on or after August 1, 1946, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries.

38 U.S.C. 3021. Payment of certain accrued benefits upon death of a beneficiary.

(a) Except as provided in section 3202(a)(2)(A) of this title and sections 123-128 of title 31, periodic monetary benefits (other than insurance and servicemen's indemnity) under laws administered by the Veterans' Administration to which an individual was entitled at his death under existing ratings or decisions, or those based on evidence in the file at date of death (hereafter in this section and section 3022 of this title referred to as "accrued benefits") and

due and unpaid for a period not to exceed one year, shall, upon the death of such individual be paid as follows:

(1) Upon the death of a person receiving an apportioned share of benefits payable to a veteran, all or any part of such benefits to the veteran or to any other dependent or dependents of the veteran, as may be determined by the Administrator;

(2) Upon the death of a veteran, to the living person first listed below:

(A) His spouse;

(B) His children (in equal shares);

(C) His dependent parents (in equal shares).